

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in October 2012

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Immorality; Fabrication; Falsification; Disciplinary Incident; Arbitrary And Capricious; Student Discipline Form; Investigation
<u>CASE STYLE:</u>	<u>Reitter v. Brooke County Board of Education</u> DOCKET NO. 2012-1300-BroED (10/29/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant's actions warranted a suspension without pay.
<u>SUMMARY:</u>	Grievant, a teacher, was suspended for five days without pay for immorality, specifically, fabrication of a disciplinary incident. Grievant had submitted a Disciplinary Referral Form which correctly stated that a student had threatened Grievant, but the circumstances of the threat, which were stated in a cursory manner in the margin on the form, were not clearly stated. Grievant explained what had occurred when she was questioned during the investigation, and when she provided a more detailed written statement later that same day. Grievant did not fabricate a disciplinary incident, and Respondent did not demonstrate that Grievant's initial cursory, incomplete statement of the incident amounted to falsification of a disciplinary incident.

<u>KEYWORDS:</u>	Immorality; Termination; Dismissal; Abuse of Discretion
<u>CASE STYLE:</u>	<u>Hart v. Marshall County Board of Education</u> DOCKET NO. 2012-0677-MarED (10/15/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved Grievant engaged in immorality.
<u>SUMMARY:</u>	Grievant was dismissed from his employment when it was discovered that he had retained \$444.00 in reimbursements to him which should have been refunded to Respondent. Grievant's conduct was not in conformity with acceptable standards of behavior, and constituted immorality. Grievant does not dispute these facts, but argues that mitigating circumstances exist in the facts of this grievance, and that termination of his employment was excessive punishment. The record of this grievance does not support mitigation of the imposed punishment.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Extracurricular Assignments; Daily Rate; Daily Total Salary

CASE STYLE: Shouldis, et al. v. Jackson County Board of Education
DOCKET NO. 2011-1888-CONS (10/3/2012)

PRIMARY ISSUES: Whether Respondent's method of calculating extra-duty pay is in violation of statute.

SUMMARY: Grievants, regular full-time bus operators, contend that Respondent has erred in calculating their extra-duty pay. West Virginia Statute expressly addresses the compensation to be paid to service employees, such as bus operators, for extra-duty assignment trips, see W. Va. Code § 18A-4-8a(j). In order to determine the hourly rate to be paid to a service employee for making an extra-duty assignment, it is first necessary to know the amount of the individual's daily total salary. That figure is then multiplied by one-seventh to arrive at the hourly rate of pay for a bus operator's extra-duty work. The term "total daily salary" is not defined by the statute. The parties disagree as to the correct method of establishing "daily total salary."

Grievant, bearing the burden of proof in this non-disciplinary grievance, has failed to establish by a preponderance of the evidence that Respondent, Jackson County Board of Education, has violated W. Va. Code § 18A-4-8a(j) with its method of computing the rate of pay for extra-duty assignments. This grievance is DENIED.

KEYWORDS: Improvement Plan; Correctable Conduct; Insubordination; Tardiness; Performance Issues; Suspension;

CASE STYLE: Williams v. Lincoln County Board of Education
DOCKET NO. 2012-0669-LinED (10/23/2012)

PRIMARY ISSUES: Whether a thirty-day suspension was appropriate for Grievant's continuing misconduct.

SUMMARY: Grievant was suspended for thirty days without pay after two years of habitual tardiness, refusal to follow her assigned schedule as well as manipulating her sign-in sheets and time reports to cover her tardiness. Grievant argues that she had corrected some of the conduct before she was suspended and that Respondent was required to give her an improvement plan before she was suspended. Respondent demonstrated that Grievant's performance problems were reflected in regular evaluations and at least some of her behavior was not performance related and therefore not subject to an improvement plan. While the suspension appears to be longer than necessary it was not so disproportionate to the proven misconduct as to require mitigation.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Arbitrary and Capricious; Policies; Selection Decision
<u>CASE STYLE:</u>	<u>King v. Department of Health and Human Resources/Bureau for Children and Families</u> DOCKET NO. 2011-0527-DHHR (10/12/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent acted arbitrarily and capriciously in the selection of Supervisor I/Operating Supervisor.
<u>SUMMARY:</u>	Grievant applied for a posted supervisory position and was not selected for the position. She alleges the Respondent's decision to promote another candidate was arbitrary and capricious in that the interview committee ignored verifiable factors and placed inordinate weight on the interview in violation of the Respondent's policy. Grievant was unable to meet her burden of proof as Respondent's selection decision complied with the policy and is supported by substantial evidence and by a rational basis. Accordingly, the grievance is denied.

<u>KEYWORDS:</u>	Credibility; Misconduct; Arbitrary And Capricious; Drug And Alcohol Free Workplace Policy;
<u>CASE STYLE:</u>	<u>Moore v. Division of Highways</u> DOCKET NO. 2012-0431-CONS (10/25/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent established by a preponderance of the evidence that Grievant engaged in conduct which violated applicable provisions of WV Drug and Alcohol Free Workplace policy. Whether Grievant dispensed Oxycontin to a co-worker at the workplace.
<u>SUMMARY:</u>	<p>Respondent suspended Grievant while conducting an investigation into allegation of misconduct (supplying/selling pain pills to a co-worker). Respondent terminated Grievant from his duties as Transportation Crew Supervisor for violation of state Drug and Alcohol Free Workplace Policy. Respondent asserts that Grievant provided Oxycontin pills at the worksite on a frequent basis to an identified subordinate employee. Grievant denied the allegation(s). Grievant asserts that Respondent failed to meet the elements of just cause when terminating him. Grievant also asserts that, if the allegations were proven, mitigation of penalty is warranted.</p> <p>Respondent meet its burden of proof demonstrating that Grievant committed misconduct of a substantial nature. It is not established that mitigation is warranted by the facts, circumstance or severity of the discipline levied. Accordingly, this grievance is DENIED.</p>

<u>KEYWORDS:</u>	Discretionary Salary Increases; Internal Equity; Pay Plan Implementation Policy, Back Pay, Agency Discretion
<u>CASE STYLE:</u>	<u>Green v. Department of Health and Human Resources/Bureau for Children and Families and Division of Personnel</u> DOCKET NO. 2011-1577-DHHR (10/1/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved by a preponderance of the evidence that she is entitled to back pay from May 2011 to December 1, 2011, relating to the internal pay equity increase which she received.
<u>SUMMARY:</u>	<p>Grievant applied for an internal equity pay increase of at least ten percent after the moratorium on discretionary salary increases for West Virginia's state employees was lifted in late March, 2011. Respondents DHHR and BCF were charged with re-implementing the Pay Plan Implementation Policy so as to equitably provide discretionary salary increases to employees of DHHR. Soon after her request for a discretionary pay increase, Grievant learned that the re-implementation of the aforesaid policy would take several months or more, and that until the reimplementation was accomplished, she could not be approved for an increase. Therefore, Grievant promptly filed a grievance on May 2, 2011, requesting the internal equity raise because she believed that she would be entitled to the pay increase, if granted, retroactive to the date she filed her grievance. After the Pay Plan Implementation Policy was effectuated, Grievant was granted the raise she sought, effective December 1, 2011. Just prior to a level three hearing, Grievant filed a notice requesting additional relief; the ten percent pay raise she had been granted, retroactive from May 2, 2001 through December 1, 2012. She asserted she was entitled to the increase for this period because Respondents had not acted promptly enough to re-implement the Pay Plan Implementation Policy and to determine whether they would grant her appeal for a salary increase. The internal equity pay adjustment which was granted to Grievant was purely discretionary and not an entitlement. Respondents were not bound by a timetable or deadline in responding to Grievant's appeal for a raise. Grievant failed to point to any rule, regulation, statute, policy or procedure in support of her assertion that she was entitled to back pay for the aforesaid period. Grievance DENIED.</p>

KEYWORDS: Increment Pay; Years Of Service; County Employee

CASE STYLE: Bowman v. Regional Jail and Correctional Facility Authority/Western Regional Jail and Division of Personnel
DOCKET NO. 2012-0449-MAPS (10/23/2012)

PRIMARY ISSUES: Whether Grievant's years of service as a correctional officer at a county jail should be counted in the calculation of his increment pay.

SUMMARY: Grievant was employed at a county jail for twenty-two years before the jail was closed and he was transferred to a position with Respondent RJA. While employed at the county jail, Grievant contributed to the state's retirement system. Grievant retired in November 2011, and is receiving retirement benefits based upon tenure and contributions made since 1981. However, his increment payments were based only upon years of service starting with the year he became employed by Respondent RJA. Grievant asserts that the years he worked at the county jail should be counted in the calculation of his increment pay. Respondent argues that when Grievant was employed at the county jail, he was a county employee, not a state employee; therefore, years should not be counted in the calculation of his increment pay. Grievant failed to demonstrate that the years he worked at the county jail should be counted in the calculation of his increment pay. This grievance is DENIED.

<u>KEYWORDS:</u>	Job Abandonment; Medical Leave of Absence; Termination; Dismissal
<u>CASE STYLE:</u>	<u>Large v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital</u> DOCKET NO. 2012-0632-DHHR (10/11/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent demonstrated good cause for terminating Grievant under the circumstances presented.
<u>SUMMARY:</u>	<p>Grievant was a good employee who dismissed from his employment by Respondent for job abandonment. Grievant requested a personal leave of absence. He was referred to the Director of Human Resources who completed the forms for Grievant to request a medical leave of absence instead. These forms stated that Grievant would be on leave from September 11 through December 4, 2011, but a physician's statement must be provided by October 7, 2011. Grievant had told the Director of Human Resources he was not under a doctor's care. The Director of Human Resources then, before October 7, sent Grievant a letter saying he was on unauthorized leave until November 1, 2011, and reprimanding him. Shortly after October 7, Grievant told the Director of Human Resources he had not seen a doctor due to his daughter's serious illness, but his doctor had told him he would not provide a physician's statement for a period when he had not been under his care. Grievant requested a medical leave of absence for his daughter's illness. The Director of Human Resources did not make clear to Grievant what was needed from him at that point, or that his job was in jeopardy. Respondent then sent a letter to Grievant, at his old address, dated October 25, 2011, terminating his employment effective November 10, 2011, noting he had not been in contact with HHR since October 14, 2011. Respondent did not prove that Grievant had not maintained contact with HHR after October 14. Grievant did not receive the dismissal letter until late November or early December 2011, and did not have a pre-termination conference or hearing. Respondent did not prove that, under these circumstances, Grievant abandoned his job. Further, Respondent violated Grievant's due process rights. Finally, Grievant's claims regarding the cancellation of his medical insurance are not grievable.</p>

<u>KEYWORDS:</u>	Job Duties; Personnel Classification; Responsibilities
<u>CASE STYLE:</u>	<u>Chaney, et al. v. Department of Health and Human Resources/Bureau for Behavioral Health and Health Facilities and Division of Personnel</u> DOCKET NO. 2012-0728-CONS (10/31/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievants' positions should be reallocated from the Administrative Secretary classification to the Executive Secretary classification.
<u>SUMMARY:</u>	<p>Grievants are employed by Respondent DHHR in its Bureau for Behavioral Health and Health Facilities. Each Grievant performs a variety of important administrative and secretarial duties for their immediate supervisors, all of whom serve as Deputy Commissioners over various departments in the Bureau. When it came to Grievants' attention that other DHHR employees who provide similar secretarial support for Deputy Commissioners were classified as Executive Secretaries, they sought to have their positions more appropriately classified. DHHR management generally supported their efforts.</p> <p>Grievants submitted updated Position Descriptions describing their duties and responsibilities in detail. These Position Descriptions were thoroughly reviewed by the Classification and Compensation staff of the West Virginia Division of Personnel which concluded that Grievants were appropriately classified as Administrative Secretaries. Grievants appealed this determination but their appeal was denied. These grievances, which were subsequently consolidated, ensued. Grievants were unable to demonstrate that DOP's classification determination for their positions was clearly wrong. Therefore, this grievance is DENIED.</p>

<u>KEYWORDS:</u>	Pay Grade, Discretionary Pay Increase; Job Assignments
<u>CASE STYLE:</u>	<u>Blake, et al. v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital and Division of Personnel</u> DOCKET NO. 2011-0370-CONS (10/22/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievants are entitle to a 5% pay increase because they work in a dangerous job.
<u>SUMMARY:</u>	William R. Sharpe, Jr. Hospital health care workers filed this grievance alleging that they should be paid as Correctional Officers because the hospital house mostly forensic patients. Grievants abandoned their claim that they should be paid as Correctional Officers at level three, and instead claimed that they wanted a 5% pay increase because they work with difficult patients in a dangerous job. The record was unclear on the issue of classification; however, Grievants did not meet their burden of proof and establish Respondent was required to provide a 5% pay increase simply because they work at William R. Sharpe, Jr. Hospital.
<u>KEYWORDS:</u>	Policies; Heating Problems; Building Temperatures; Establishing New Policies
<u>CASE STYLE:</u>	<u>Morgan v. Division of Rehabilitation Services</u> DOCKET NO. 2012-0480-DEA (10/25/2012)
<u>PRIMARY ISSUES:</u>	Whether Grievant has presented a claim upon which relief can be granted.
<u>SUMMARY:</u>	Grievant is requesting relief in the form of a new policy being created by Respondent. The undersigned is without authority to order such relief. Grievant has presented no claim on which relief can be granted. Accordingly, Respondent's Motion to Dismiss is granted.
<u>KEYWORDS:</u>	Policy Directive; Security Breach; Inmate Discussions
<u>CASE STYLE:</u>	<u>Sickler, Jr. v. Division of Corrections/Pruntytown Correctional Center</u> DOCKET NO. 2012-0904-MAPS (10/15/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved the charges against Grievant, and whether Grievant's discussion with inmates violated policy.
<u>SUMMARY:</u>	Grievant was suspended for three days without pay for discussing an inmate housed at Pruntytown Correctional Center with two other inmates, and for discussing with the two inmates the subject of informants, or "rats," at the facility, which was a security breach and violation of policy. Respondent proved the charges against Grievant that the discussion with the inmates was a violation of policy, and that Grievant had been made aware of the policy.

<u>KEYWORDS:</u>	Progressive Discipline; Disciplinary Action; Policy And Procedure; OT Security Policy; Harassment; Insubordination
<u>CASE STYLE:</u>	<u>Dyke v. Division of Corrections/Parole Services</u> DOCKET NO. 2012-0346-MAPS (10/16/2012)
<u>PRIMARY ISSUES:</u>	Whether Respondent proved that Grievant violated various DOC policies and whether his three-day suspension was warranted.
<u>SUMMARY:</u>	<p>Grievant was suspended for three days without pay for allegedly violating various Department of Corrections policies by using a computer system password in which he called a co-worker a name. Grievant's employer had required him to disclose the password to the co-worker during an email exchange. Grievant's co-worker, not knowing what the words used in the password meant, and not taking the time to review their definitions, assumed the words were vulgar in nature. The co-worker complained to Grievant's supervisor, who then asked Grievant to change his password. The co-worker, not happy with the supervisor's course of action, immediately filed an EEO complaint against Grievant alleging sexual harassment. An EEO investigation revealed no evidence to substantiate the co-worker's sexual harassment claims. However, the EEO investigators alleged that Grievant had violated various DOC policies. Acting only upon the findings of the EEO investigators, Respondent suspended Grievant for three days without pay. Grievant denied all charges against him. Grievant also asserted that Respondent violated certain information security policies by requiring him to disclose his password to another.</p> <p>Respondent proved that Grievant violated two DOC policies by using insulting language toward a co-worker and by exhibiting unprofessional conduct. However, Respondent failed to prove all of the other charges it alleged against Grievant. Grievant demonstrated that the discipline imposed was clearly excessive.</p>

KEYWORDS: Progressive Discipline; Suspension, Leave Abuse; Insubordination; Functional Demotion

CASE STYLE: Koblinsky v. Putnam County Health Department

DOCKET NO. 2011-1772-CONS (10/23/2012)

PRIMARY ISSUES: Whether Respondent established that the disciplinary charges were sufficiently egregious to warrant Grievant's termination, whether certain of Grievant's activities were protected by the First and Fifth Amendments, and whether the duty to mitigate damages by accepting similar employment if it is available in the local area continues once the former employee has enrolled as a full-time student.

SUMMARY: This consolidated matter involves seven separate grievances which Grievant filed against PCHD, starting with a challenge to a leave restriction she was given, followed by an objection to a change in duties which she contends amounted to a "functional demotion," thereafter proceeding through three written disciplinary warnings or reprimands, followed by a combined reprimand and indefinite suspension, ultimately culminating with termination of her employment. These grievances represent the most recent developments in an ongoing dispute between Grievant and her employer which previously generated three decisions by this Grievance Board, including a ruling which overturned a previous termination of Grievant, based upon a finding that PCHD violated her rights under the grievance statute for public employees, W. Va. Code § 6C-2-1, et seq.

The most recent disciplinary actions Grievant is contesting generally involve charges of insubordination, or failure to comply with orders and directives in some manner. However, her termination included a charge that she abandoned her job. Grievant adamantly disputes most of these charges, asserting that various facts are inaccurate, exaggerated or fabricated, while strenuously contending that this entire pattern of adverse actions resulted from her supervisors' systematic retaliation against her for exercising her First Amendment rights of speech and association, more particularly engaging in protected speech and associating with a labor union, and for exercising her statutory right to submit grievances using the public employees grievance procedure established in W. Va. Code § 6C-2-1, et seq.

Some of Grievant's claims are unfounded and meritless while others are on point and persuasive. For reasons more fully set out below, this grievance is denied, in part, and granted, in part.

KEYWORDS: Selection; Favoritism; Seniority; Arbitrary and Capricious

CASE STYLE: Dixon v. Division of Highways
DOCKET NO. 2011-1658-DOT (10/12/2012)

PRIMARY ISSUES: Whether Respondent acted arbitrary and capriciously in the job selection process.

SUMMARY: Grievant applied for the position of Transportation Crew Supervisor II. He was one of two applicants for the position. However, Grievant was not selected for the position. Grievant asserts that he was the more qualified candidate, and that was the other applicant was selected not based upon his qualifications, but because of favoritism; therefore, the selection process was arbitrary and capricious. Respondent denies Grievant's allegations, asserting that the selection process was conducted properly, and that the most qualified candidate was selected. Grievant failed to meet the burden of proving his claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Withdrawal of Resignation; Good Faith Reliance

CASE STYLE: Arnold v. Department of Health and Human Resources/Bureau for Children and Families
DOCKET NO. 2011-0437-DHHR (10/5/2012)

PRIMARY ISSUES: Whether Respondent accepted the resignation through either clear communication with Grievant or by acting in good faith reliance upon the resignation. Whether Grievant established that the working conditions created by or known to the employer were so intolerable that Grievant was compelled to quit.

SUMMARY: Grievant alleges constructive discharge due to the conduct of her former supervisor and also alleges that Respondent improperly denied her right to withdraw her resignation. While the former supervisor's treatment of Grievant was harsh and unpleasant, it was not so intolerable that a reasonable person would have been compelled to resign. Grievant did not feel intimidated or threatened to the point where she could not exercise free choice. Respondent did not act improperly in denying Grievant's request to withdraw her resignation as Respondent had already acted in good faith reliance on Grievant's tender of resignation. Accordingly, the grievance is denied.